MBF FINANCE BHD

v.

CAHAYA LUAS SDN BHD & ORS

HIGH COURT MALAYA, IPOH
SU GEOK YIAM JC
[CIVIL SUIT NO: 22-241-99]
14 JUNE 2001

HIRE PURCHASE: *Ownership - Goods under hire purchase - Whether owned by defendants and not plaintiffs before execution of hire purchase agreement - Whether valid agreement - Whether defendants raised arguable defence*

Pursuant to the 1st defendants' default in payment under a hire purchase agreement entered into between the plaintiffs and the 1st defendants for the renting of some heavy machinery, the plaintiffs commenced this writ action for settlement and costs against the defendants. The learned deputy registrar allowed the plaintiffs' application for summary judgment to be entered against the defendants, ruling that there were no triable issues which merited a full trial. Dissatisfied with the decision, the defendants appealed, arguing that the said machinery was bought and owned by the 1st defendants and not the plaintiffs before the execution of the said hire purchase agreement.

Held:

[1] Two documents, an invoice and loan discharge advice which were relied upon by the plaintiffs as showing proof of their ownership of the said machinery before the execution of the said hire purchase agreement would appear to suggest the reverse, *ie* that it was the 1st defendants and not the plaintiffs which were the owners of the machinery before the execution of the said hire purchase agreement. (p 40 g-i)

[1b] It was important for the plaintiffs to have had a title in the machinery prior to the execution of the hire purchase agreement with the 1st defendants. If the ownership of the said machinery was already vested in the defendants prior to such execution, the true effect of the transaction between the plaintiffs and the 1st defendants may not have been a valid hire purchase agreement. It could have been a loan transaction or some other transaction. In view of this arguable defence, the summary judgment procedure was inappropriate for the determination of the plaintiffs' claim. (pp 41 g-h & 46 d)

[Defendants' appeal allowed with costs.]

Case(s) referred to:

Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors [2000] 2 CLJ 457 ***(foll)***

Anglo-American Corporation Ltd v. Goodwood Sawmill Co [1966] 2 MLJ 263 ***(foll)***

BSNC Leasing Sdn Bhd v. Sabah Shipyard Sdn Bhd & Ors And Another Appeal [2000] 2 CLJ 197 ***(foll)***

Gooi Seang Tuck v. Tan Peng Loan [1959] 25 MLJ 153 ***(refd)***

Hagemeyer Trading Co (Malaysia) Sdn Bhd v. Gibson Trading Co [1978] 2 MLJ 101 ***(refd)***

Leong Weng Choon v. Consolidated Leasing (M) Sdn Bhd [1998] 3 CLJ 619 ***(foll)***

Low Ping Ming v. MBf Finance Bhd [2000] 2 CLJ 307 ***(foll)***

Legislation referred to:

Rules of the High Court 1980, O. 14, O. 16

For the appellant - Zaizuraimy Abd Rahim; M/s Wong Hau Lik & Co
For the respondent - Saranjit Singh; M/s Adliza, Subra & Partner

Reported by Raja Vishnu Selvarajah

JUDGMENT

Su Geok Yiam JC:

This is an appeal against my decision allowing the defendant's appeal (encl. 26) against the order of the learned deputy registrar dated 25 September 2000 allowing the plaintiffs' application (encl. 9) for summary judgment to be entered against the defendants.

Facts And Chronology

On 2 May 1996, the plaintiffs, a licensed finance company incorporated in Malaysia under Companies Act 1965, entered into a hire purchase agreement with the first defendants, a private ltd co., also incorporated in Malaysia under the Companies Act 1965. Pursuant to the said hire purchase agreement bearing No. 2-0810-720125-6 (hereinafter referred to as "the said hire purchase agreement") the plaintiffs rented to the first defendants one unit of new "SCHLICK roller conveyer shot blast plant type ROTOJET RB 1500/7.5 and eight (hereinafter collectively referred to as "the said machinery") for a total sum of RM738,562.75.

The 2nd, 3rd, 4th, 5th and 6th defendants are the alleged guarantors for the 1st defendants.

The 1st defendants having defaulted on payment, the plaintiffs sent a notice of demand dated 17 June 1999 to all the defendants through its solicitors, Tetuan Adliza Subra & Partners, claiming a sum of RM239,112.78 together with interest on the principal sum wef 17 June 1999.

The defendants having failed to comply with the notice of demand, the plaintiffs commenced this writ action on 23 July 1999 against all the defendants claiming a sum of RM310,199.98 together with interest at 12% per sum wef 5 July 1998 until the date of full settlement and costs.

On 25 August 1999, the defendants entered their appearance. This was followed by their statement of defence (encl. 4) which was filed on 8 September 1999. On the same date the defendant also took out a 3rd party notice against one Nipponalloy Corporation (H) Sdn Bhd pursuant to O. 16 of the Rules of the High Court 1980.

The Defendants' Statement Of Defence

In their statement of defence, the 2nd to the 6th defendants denied they were the guarantors of the 1st defendants. The defendants also contended as follows:

(1) the 1st defendants had assets and did not require any guarantor;

(2) the defendants were never given a copy of the said hire purchase agreement;

(3) the amount claimed, ie, RM310,199.98, is excessive and incorrect;

(4) the said machinery had already been taken over by a 3rd party, Nipponalloy Corporation (M) Sdn Bhd, with the knowledge of the plaintiffs; and

(5) the defendants did not receive the notice of demand.

The 3rd party notice having been duly served, the 3rd party entered its appearance on 21 September 1999.

The Plaintiffs' Application For Summary Judgment

On 27 January 2000, the plaintiffs applied *vide* their summons-in-chambers (encl. 9) for summary judgment against the defendants pursuant to O. 14 of the Rules of the High Court 1980 on the following grounds:

(a) that the 1st defendants was in breach of the said hire purchase agreement in failing to pay the monthly rental instalments;

(b) that the 2nd, 3rd, 4th, 5th & 6th defendants were in breach of their contract of guarantee in failing to make payment upon the failure of the 1st defendants to pay the monthly instalments pursuant to the said hire purchase agreement; and

(c) that the defendants had no defence to the plaintiffs' cause of action.

On 25 September 2000, the learned deputy registrar allowed summary judgment to be entered against the defendants.

Dissatisfied with the decision the defendants appealed *vide* (encl. 26) to the judge in chambers.

The Defendants' Appeal To The Judge In Chambers

When the appeal first came up for hearing, Mr. Sarajit Singh, the learned counsel for the plaintiffs, put forth a preliminary objection. He contended that the notice of appeal was defective as it was served out of time. Further, there was no application by the defendants for an extension of time to serve the notice of appeal out of time.

In support thereof he cited the cases of *Gooi Seang Tuck v. Tan Peng Loon* [1959] 25 MLJ 153 and *Hagemeyer Trading Co (Malaysia) Sdn Bhd v. Gibson Trading Co.* [1978] 2 MLJ 101, 104.

No prior notice of the preliminary objection having been given to Encik Zaizuraimy, the learned defendants' counsel, and there being no objection by the learned plaintiffs' counsel who was gracious enough to apologise to the court for not giving prior notice to his learned opponent, the court allowed Encik Zaizuraimy's application for a postponement to respond to the preliminary objection.

On the next date when the case came up for continued hearing the learned defendants' counsel prayed for the preliminary objection to be dismissed on the ground that the delay of two weeks was caused by the delay on the part of the court in not issuing the notice of appeal within the prescribed time and there was no prejudice to the plaintiffs if the court were to proceed with the hearing of the appeal. The learned plaintiffs' counsel conceded that the notice of appeal which should have been issued by the court within five days had not been so issued and he was content to leave his submissions at that.

In view of the concession of the learned plaintiffs' counsel, the court proceeded to dismiss the preliminary objection.

The court having dismissed the plaintiffs' preliminary objection the learned defendants' counsel tendered his written submission and his bundle of authorities in support of his contention that there are two triable issues and that the learned deputy registrar had erred when ordering summary judgment to be entered in favour of the plaintiffs instead of dismissing the plaintiffs' application and setting down the case for trial.

Whether Any Triable Issue

The court has to determine whether the following two issues which were raised by the defence are triable issues:

(1) the said hire purchase agreement is not a genuine hire purchase agreement because the ownership of the said machinery had already vested in the 1st defendants before the execution of the said hire purchase agreement; and

(2) even assuming the said hire purchase agreement is a genuine one, it is still subsisting as it had not been terminated before the writ action was filed.

The plaintiffs and defendants have filed a total of 7 and 4 affidavits, respectively.

In its supporting affidavit (encl. 10) the plaintiffs have relied on the said hire purchase agreement dated 2 May 1996 (exh. "KTS1"), the letter of guarantee dated 2 May 1996, (exh. "KTS2") a copy of the invoice for the SCHLICK ROTOJET plant (exh. "KTS3"), the notice of repossession dated 10 April 1998 (exh. "KTS4"), the letter of demand dated 17 June 1999 sent by its solicitors, Tetuan Adliza Subra & Partners to the defendants (exh. "KTS5") and the statement of account showing the sum of RM310,199.98 as the sum owing as at 4 July 1999 (exh. "KTS6").

In its affidavit-in-reply affirmed on 8 March 2000 by the 6th defendant, a director of the 1st defendant, filed on 8 March 2000 (encl. 11) opposing the plaintiffs' application for summary judgment the defendants had raised the following issues:

(1) the plaintiffs' application was frivolous, vexatious and an abuse of the process of the court because it was filed after the defendants had filed their statement of defence;

(2) the said hire purchase agreement was not signed by the 1st defendants as alleged by the plaintiffs. Neither did it bear the common seal of the 1st defendants nor was there any detail about the identity of the signatory;

(3) further or in the alternative, the validity of the said hire purchase agreement is disputed because the 3rd page clearly showed that there was no "dealer";

(4) pursuant to the said hire purchase agreement if the 1st defendants failed to pay any of the rental instalments or breached any of the terms of the said hire purchase agreement the plaintiffs were only entitled to terminate the said hire purchase agreement by giving prior notice in writing although there are words to the effect that no notice is required;

(5) the said machinery were not the property of the plaintiffs and in the event of any breach by the 1st defendants in the payment of the rental instalments the plaintiffs were not entitled to terminate the said hire purchase agreement nor to claim the balance of the rental including loss of profits;

(6) the letter of guarantee (exh. "KTS2") is invalid because it was completed in a confusing manner as it gave the impression that the 3rd defendant had given two guarantees on the same date;

(7) the copy of the invoice for the SCHLICK ROTOJET Plant (exh. "KTS3") shows that the said machinery were owned by the 1st defendants as early as March 1996; and

(8) the alleged statement of account (exh. "KTS6") does not contain any statement of account nor does it show how it was prepared nor who prepared it.

The plaintiffs in its 1st affidavit in reply filed on 29 May 2000 (encl. 12) and affirmed by its officer, Starry Doong Sing Kaung on 26 May 2000, stated in para. 4, that the 3rd and 6th defendants had signed, the said hire purchase agreement on behalf of the 1st defendants, in front of him.

In para. 5, he explained that the said machinery had been imported from abroad under the name of the 1st defendants and consequently, the name of the dealer was not stated in the said hire purchase agreement (exh. "KTS1").

The deponent, Starry Doong, also denied that there was confusion in the letter of guarantee (exh. "KTS2") and clarified that the 3rd and 6th defendants had filled in the letter of guarantee twice because on the first occasion they had signed as guarantors and on the second occasion they had signed as representatives of the 1st defendants being the directors of the 1st defendants. There was another affidavit-in-reply (encl. 13) which was affirmed by Koh Tin Sek, the branch manager of the plaintiffs, who in para. 12 also explained that the said machinery were imported by the plaintiffs and rented out to the 1st defendants.

In response to the two affidavits-in-reply of the plaintiffs *vide* its affidavit filed on 7 July 2000 (encl. 17) the defendants denied that Starry Doong had witnessed their signatures. They relied on the endorsement "Blank. confirmed with Mr. Lim Look Meng 13 May 1996" to show that the said hire purchase agreement could not have been signed on 2 May 2000 since this portion was left blank right until 13 May 1999.

The defendants insisted that the 1st defendant had bought the said machinery as is reflected in the invoice (exh. "KTS3").

The defendants reiterated that the letter of guarantee (exh. "KTS2") was signed in blank and at the time of signing it was confusing.

The plaintiffs in its second affidavit-in reply affirmed on 21 July 2000 by Starry Doong, and filed on 21 July 2000 (encl. 18) said that Starry Doong had explained the contents of the said hire purchase agreement in English to the 3rd and 6th defendants before they signed it. He reiterated that since the said machinery had been imported from the dealer overseas by the plaintiffs, the portion concerning the dealer was left blank in the said hire purchase agreement. He maintained that 2 May 1996 was the correct date of the signing of the said hire purchase agreement.

In para. 7, he stated that the plaintiffs had made full payment to the dealer and that the said machinery were sent to Malaysia under the name of the 1st defendants. He exhibited a copy of the loan discharge advice and the letter to OUB (exh. "SDSK1") to support this.

It is pertinent at this juncture to note that no explanation was given as to why the said machinery were sent to Malaysia under the name of the 1st defendants instead of under the name of the plaintiffs if it was indeed true, that it was the plaintiffs who had purchased the said machinery from the overseas dealer.

The plaintiffs relied on the payment by the 1st defendants on the deposit of RM126,922.62 and also the monthly instalments for a period of three years and the request by the defendants for an extension of the said hire purchase agreement as evidence that the defendants had agreed to its terms. The plaintiffs also exhibited the plaintiffs' offer to the 1st defendants which bore the signatures of two directors and the correspondences between the plaintiffs and the 1st defendants concerning the extension of the hire purchase facility, collectively, as exh. "SDSK2".

In conclusion Starry Doong again reiterated that all the particulars in the said hire purchase agreement and the guarantee had been filled in before the two documents were signed by the defendants.

Filed together with Starry Doong's affidavit was also an affidavit-in-reply by Koh Tian Sek, also, on behalf of the plaintiffs (encl. 19). He reiterated in para. 5, that the said machinery had been bought by the plaintiffs for rental to the 1st defendants and that the said hire purchase agreement had been signed by the 3rd and 6th defendants on behalf of the 1st defendants and in para. 9, that the defendants were educated people and could have objected if the part particulars of the said hire purchase agreement had not been filled in at the time of signing.

In para. 10, he denied that the statement of account did not show how the amount owing had been derived at nor the person who had confirmed the correctness of the amount.

He went on to exhibit as "KTS1" an undated certificate of indebtedness signed by him confirming the amount due from the defendants as RM310,199.99 as at 4 July 1999 together with interest until date of full settlement and costs.

Since there were clearly disputed issues of fact as was borne out by the conflicting affidavits and there was also a new matter put in, ie, the certificate of indebtedness, it was not surprising, therefore, that the defendants responded to the plaintiffs' second set of affidavits-in-reply (encls. 18 and 19) by filing their second affidavit-in-reply (encl. 20) on 2 August 2000.

Apart from denials there were two assertions. In para. 5, Chan Har @ Chen Fook Khim, the 6th defendant, who affirmed the affidavit for all the other five defendants, contended that the certificate of indebtedness was incorrect in view of the plaintiff's failure to terminate the said hire purchase agreement because no one knows which date should be taken as the effective date for the calculation of the amount due and owing by the defendants.

In para. 9, he raised a new issue, ie, that the guarantee was not valid because it failed to give an option to the guarantors to continue with the said hire purchase agreement in the event of a default by the 1st defendants.

The learned deputy registrar considered a total of nine issues which had been raised by the defendants in their statement of defence and affidavits-in-reply before ruling that there were no triable issues which merited a full trial.

The nine issues are as follows:

(1) the said hire purchase agreement was not signed by the 1st defendants and there was no common seal or particulars of the signatory;

(2) there was no signature in the space reserved for "dealer" in p. 3 of the said hire purchase agreement;

(3) the letter of guarantee is invalid because the 3rd defendant gave two guarantees on the same date;

(4) the statement of account is baseless because it did not state who prepared it and how it was prepared;

(5) the defendants were not given a copy of the said hire purchase agreement;

(6) the sum claimed by the plaintiffs is incorrect and excessive;

(7) the said machinery have already been taken possession of by Nipponalloy Corporation (M) Sdn Bhd, the 3rd party in this case;

(8) the said machinery were bought by the 1st defendants and were owned by the 1st defendants and not the plaintiffs before the execution of the said hire purchase agreement; and

(9) the plaintiffs are not entitled to claim the whole sum as they did not terminate the said hire purchase agreement.

In the appeal before me the defendants are relying only on the last two grounds, ie, grounds (8) and (9). In view of that I shall deal only with those two grounds.

The court is mindful of the principles governing summary judgment under O. 14 of the Rules of the High Court 1980 and the numerous decided cases. In this appeal suffice for me to refer to just one.

In *Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors* [2000] 2 CLJ 457 His Lordship Mokhtar Sidin, JCA in delivering the judgment of the Court of Appeal had this to say at p. 470, para. g onwards until p. 471, para. a:

> In a nutshell, in an application under O. 14 made by the plaintiff for summary judgment without trial, the general principles established are that the plaintiff has to satisfy the court that the defendant plainly and obviously has no defence to the plaintiff's claim or part of the plaintiff's claim. If the plaintiff is able to satisfy the court, then summary judgment should be entered in the plaintiff's favour.
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> On the other hand, if the defendant can show that there is a serious conflict of material facts as disclosed in the opposing affidavits, or there is otherwise a triable issue worthy of judicial investigation in the trial of the action, or there is an important and difficult point of law requiring further and mature consideration at the trial, summary judgment should be refused.

First Ground: Ownership Of The Said Machinery

Having considered the submissions of the learned defendants' counsel the court is satisfied that the two documents relied upon by the plaintiffs as showing proof of their ownership of the said machinery before the execution of the said hire purchase agreement would appear to suggest the reverse, ie, that the 1st defendants and not the plaintiffs were the owners of the said machinery before the execution of the said hire purchase agreement. This is because in the first document, ie, the invoice (exh. KTS3, encl. 10), the name of the consignee is the 1st defendants and the terms of payment are clearly set out.

The plaintiffs' name appear nowhere in the invoice. The invoice which is dated 21 March 1996 also suggests that the only parties to the importation of the said machinery were the 1st defendants and the dealer in Germany.

As for the loan discharge advice dated 2 May 1996 (exh. "SDSK1", encl. 18), again the name of the 1st defendants appear. Although the name of the plaintiffs also appear this does not indicate conclusively that title in the said machinery had vested in the plaintiffs at that stage.

The said hire purchase agreement is also dated the same date as the loan discharge advice, ie, 1 May 1996. In my view this could suggest that the ownership in the said machinery had passed to the 1st defendants from the dealer in Germany before the execution of the said hire purchase agreement.

This could explain why the relevant part of the said hire purchase agreement pertaining to "dealer" was left blank in the said hire purchase agreement. There is, therefore, a triable issue which certainly merits a full trial.

In *Low Ping Ming v. MBf Finance Berhad* [2000] 2 CLJ 307 Steve Shim J (as His Lordship then was) had found that at the material time of the transaction between the plaintiffs and the dealer of the machinery the defendant was a stranger because the hire purchase agreement was entered into subsequent to the said transaction. His Lordship also found that at the time of the execution of the hire purchase agreement, the title to the machinery (and hence the ownership) was already vested in the plaintiff as it had made an initial part payment of the purchase price to the dealer and had taken delivery of the machinery. His Lordship then went on to declare that the subsequent hire purchase agreement entered into between the plaintiff and the defendant was invalid because it was not a true hire purchase agreement and the defendant's repossession of the machinery was also invalid as it was based upon an invalid hire purchase agreement.

The above case illustrates the importance of the plaintiffs in the present case having title in the said machinery prior to the execution of the said hire purchase agreement with the 1st defendants. If the ownership of the said machinery was already vested in the defendants prior to such execution the true effect of the transaction between the plaintiffs and the 1st defendants may not be a valid hire purchase agreement. It could be a loan transaction or some other transaction.

In *BSNC Leasing Sdn Bhd v. Sabah Shipyard Sdn Bhd & Ors & Another Appeal* [2000] 2 CLJ 197, the first issue which came up for the determination of the Court of Appeal was as follows (at p. 207):

The First Issue: Passing of Property

To succeed in its application for repossession, BSNC leasing had to demonstrate that the property in the turbine had passed to it before it entered into the hire purchase agreement with Sabah Shipyard. Only on that basis could it be argued with any conviction that there was a genuine hire purchase transaction.

In the court below, Sabah Shipyard argued that the property in the turbine had always remained with it and had never passed to BSNC Leasing. It was contended that the so-called hire purchase agreement was a sham: a device to cloak the real transaction, which was one of loan upon the security of the turbine. It was also submitted that the hire purchase agreement was in truth an unregistered bill of sale that was void against Sabah Shipyard by reason of the provisions of s. 106 of the Companies Act 1965.

At pp. 211 and 212 the Court of Appeal decided the first issue as follows:

... if one were to go behind the principal document one would discover not a shred of evidence to show that the turbine in question had been sold to BSNC Leasing at any point in time before the execution of the hire purchase agreement. Yet the hire purchase agreement refers to BSNC Leasing as owner of the turbine which is plainly not the truth ... the fair inference to be drawn from the totality of the evidence is that Sabah Shipyard owed Wing Teik RM120 million and the hire purchase agreement was used as a device to cloak the real transaction which was a loan upon the security of goods. In short, the hire purchase agreement was an unregistered bill of sale. Not being in the statutory form, it was non-registrable and was therefore void. Accordingly, the learned Judge was entirely correct in dismissing BSNC Leasing summons for leave to re-possess the turbine.

Applying that case to the facts of the present case, I am of the view that the 1st issue can only be determined at the trial upon hearing evidence from the witnesses of both sides. If the said hire purchase agreement was merely a disguise for a loan transaction then it is invalid.

It is noteworthy that the plaintiffs have not taken any steps to repossess the said machinery other than to send a notice of intended repossession giving rise to the impression that the transaction may not be a genuine hire purchase transaction.

Second Ground: Termination Of The Hire Purchase Agreement

Assuming the court is wrong on the 1st ground and the said hire purchase agreement is a genuine and valid hire purchase agreement the court shall proceed to deal with the second ground of appeal, ie, whether the said hire purchase agreement had been duly terminated before the filing of this writ action. It is not in dispute that no notice of termination was ever given to the defendants before the plaintiffs instituted the writ action.

It is also not in dispute that cl. 5(f) of the said hire purchase agreement has provided as follows:

> If the hirer shall
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> (a) **make default in punctually paying the initial payment of any of the hire rentals or any other sums payable under the Agreement (whether demanded or not) or**
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> (b) ...
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> (c) ...
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> (d) ...
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> (e) ...
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> (f) ...
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> **then it shall be lawful for the Owner** (but without prejudice to the Owner) **without notice to terminate this hiring** or by written notice sent (by post or otherwise) to or left at the Hirer's last known address forthwith to determine this hiring, and the Owner's consent to the Hirer's possession of the said goods shall be deemed to be withdrawn and the Hirer shall forthwith at the Hirer's expense deliver up the said goods to the Owner and the Owner and its servants or agents shall be entitled without any notice to enter upon any premises where the said goods may be and seize and take possession thereof and to recover all charges costs and expenses incurred in connection therewith. (emphasis added)

Despite this provision the defendants contend that a notice of termination is required before the plaintiffs can terminate the said hire purchase agreement. Otherwise the said hire purchase agreement is still valid and subsisting and the plaintiffs can only claim for the arrears of rental instalments but not for the total balance.

The court is in agreement with the defendants' contention. This is borne out in the two cases cited below.

In the first case of *Anglo-American Corporation Ltd v. Goodwood Sawmill Co* [1966] 2 MLJ 263, there was a clause in the hire purchase agreement concerning a tractor which provided as follows:

> **If the hirer shall not duly pay to the owners any of the sums herein provided to be paid ... then the owners** shall forthwith become entitled to immediate possession of the property and **may in every such case:** (a) without prejudice to any claim for arrears of hire-rent or damages for breach of this agreement forthwith and **without notice** or demand **terminate the hiring** and retake possession of the property; and/or (b) by written notice either served

> personally on the hirer or sent by post or otherwise to the hirer or to his last known address forthwith for all purposes absolutely determine and end this agreement and the hiring hereby constituted and thereupon the hirer shall no longer be in possession of the property with the owners' consent nor shall either party thereafter have any rights under this agreement, but such determination shall not discharge any pre-existing liability of the hirer to the owners. (emphasis added)

The defendants defaulted on payment of the instalments amouting to RM10,381.43. The plaintiffs repossessed the tractor and sued the defendants for certain sums of money to which they alleged they became entitled on their terminating the hiring by reason of the defendants' default. The defendants contended that the plaintiffs committed a breach of the agreement by taking possession of the tractor without a prior notice terminating the hire purchase agreement.

In dismissing the defendants' contention and in allowing the plaintiffs' claim, Gill J (as His Lordship then was) had to say at p. 264, para. F, right hand column onwards until para. I:

> Under the agreement here the owners became entitled to immediate possession on the default by the hirer to pay the hire-rents on the due dates, where upon they were at liberty "forthwith and without notice or demand (to) terminate the hiring and retake possession". As stated in the same foot-note on Goode on *Hire purchase* starting at page 98:
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> > *Where notice of termination is not required by the agreement, all that is necessary to bring the agreement to an end is some unequivocal act by the owner indicating his intention to treat the agreement as terminated. Repossession of the goods will normally suffice for this purpose.*
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> Goode on *Hire purchase* in the text at the same page says:
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> > "A provision that in certain events the owner should have power to declare the hiring terminated" implies that notice is to be given to the hirer or some other act done which is equivalent to a declaration to the hirer that the owner regards the agreement as at an end. It is otherwise, however, if the agreement states merely that the owner 'may terminate the hiring'. (emphasis added)

In the second case of *Leong Weng Choon v. Consolidated Leasing (M) Sdn Bhd* [1998] 3 CLJ 619 the Court of Appeal held that the default of a hirer in the payment of the monthly instalments under a hire purchase agreement does not amount to a termination of the agreement because the owner has the option to terminate or carry on with the agreement despite the hirer's default.

His Lordship NH Chan JCA in delivering the judgment of the court said as follows, at p. 624:

> Even if the first defendant had repudiated (that is to say "refused to perform" the agreement "in its entirety" by refusing to pay at all any further rental instalments, (as a matter of contract law) that would not have terminated the agreement. In this case it is only the plaintiff who has the right to terminate the agreement. Put in another way, the plaintiff could elect to treat the contract as at an end by accepting the repudiation and terminating the contract. See s. 40 of the Contracts Act 1950 which read:
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> > 40. When a party to a contract has **refused to perform,** or disabled himself from performing, **his promise in its entirety,** the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance. (emphasis added)

as follows, at p. 625:

> In the present case, the first defendant had disabled itself from performing its agreement in its entirety by losing the bus to the authorities. Even this fact would not mean that the first defendant had terminated the hire purchase agreement. Section 40 of the Contracts Act gives to the plaintiff (that is, the promisee) the right to elect to terminate the agreement and recover damages under s. 76 of the Act or to treat the agreement as alive and continuing.
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> In other words, the plaintiff could either accept the repudiation by terminating the agreement or he could ignore the breach by treating the contract as alive and subsisting. As a matter of fact as well as on the pleadings the plaintiff did not terminate the contract despite the repudiation by the first defendant so that the contract is still subsisting.

and as follows at p. 627:

> In the present case, as the hire purchase agreement was stril subsisting since the plaintiff did not determine it (under s. 40 of the Contracts Act, or repossess the bus (under s. 16 of the Hire Purchase Act) nor did the first defendant return it to the plaintiff (under s. 15 of the same Act), the plaintiff has the right still to recover instalments due under the agreement. Unfortunately for the plaintiff, there was no claim for arrears of instalments in its statement of claim. Therefore, as the plaintiff did not claim for arrears of instalments against the first defendant, there was no liability of the first defendant (hirer) for the appellant (guarantor) to make good under the terms of his guarantee.

Applying the principles of law in these two cases to the facts of the instant case, the court is of the view that the plaintiffs must do an unequivocal act to indicate to the 1st defendants that the plaintiffs are terminating the said hire purchase agreement although the words used in cl. 5 of the said hire purchase agreement are to the effect that the plaintiffs are entitled to terminate

the agreement without notice upon the 1st defendants' default in the payment of the monthly rental instalments. Unfortunately for the plaintiffs, the facts relied upon by the plaintiffs in their affidavits do not show plainly and obviously that the plaintiffs have in fact terminated the said hire purchase agreement before the filing of this writ action. The plaintiffs did not repossess the said machinery or do some other unequivocal act to signify to the plaintiffs that they are putting an end to the said hire purchase agreement. Thus the said hire purchase agreement is still valid and subsisting. The plaintiffs are not entitled to the total balance due. The plaintiffs are only entitled to the arrears of rental instalments. But there was no such claim in the writ action.

A *fortiori* the second ground of appeal also discloses a triable issue which merits a trial.

As the court was satisfied that the summary judgment procedure in O. 14 of the Rules of the High Court 1980 was inappropriate for the determination of the plaintiffs' claim in view of the two arguable defences raised by the defendants the court allowed the defendants' appeal with costs.